

In the Supreme Court of the United States

OCTOBER TERM, 1977

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MICHAEL RODAK, JR., CLERK

ALLIED-GENERAL NUCLEAR SERVICES, ET AL., PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

COMMONWEALTH EDISON COMPANY, ET AL., PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

WESTINGHOUSE ELECTRIC CORPORATION, PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

BALTIMORE GAS AND ELECTRIC COMPANY, ET AL.,
PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

*ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

SUGGESTION OF MOOTNESS

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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OCTOBER TERM, 1977

No. 76-653

ALLIED-GENERAL NUCLEAR SERVICES, ET AL., PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

No. 76-762

COMMONWEALTH EDISON COMPANY, ET AL., PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

No. 76-769

WESTINGHOUSE ELECTRIC CORPORATION, PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

No. 76-774

BALTIMORE GAS AND ELECTRIC COMPANY, ET AL.,
PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

*ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
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SUGGESTION OF MOOTNESS

In November 1975 the Nuclear Regulatory Commission issued a statement establishing procedures for completion of its generic environmental inquiry (the GESMO proceedings) concerning the licensing of facilities to

reclaim or recycle plutonium from nuclear fuel and to use fuel containing plutonium in nuclear reactors (Pet. App. A-1 to A-33; 40 Fed. Reg. 53056 and 59497).¹ The Commission stated that it would consider granting licenses for particular proposed facilities prior to the completion of the GESMO proceedings.

The court of appeals held that the Commission could not issue any license until it had completed the GESMO proceedings (Pet. App. A-34 to A-73; 539 F. 2d 824). It denied a petition for rehearing, explaining in a brief opinion (Pet. App. A-74 to A-77) that it saw no reason to alter its judgment as a result of this Court's intervening decision in *Kleppe v. Sierra Club*, 427 U.S. 390. Several private parties, but not the Commission, sought review by this Court; the Commission filed a memorandum stating that the court of appeals' decision, although inconsistent with *Sierra Club*, was not necessarily important.² This Court granted the petitions on March 28, 1977.

On April 7, 1977, President Carter announced a new nuclear power policy that called for indefinite deferral of any commercial reprocessing of plutonium. The Commission promptly began to reconsider its position and requested public comments.

By an order issued December 23, 1977, the Commission terminated the GESMO proceedings, withdrew its November 1975 policy statement, and announced that it will not consider applications for licenses related to the

commercial reprocessing or recycling of plutonium.³ The Commission anticipates that it will not resume consideration of the commercial recycling of plutonium, if it ever does so, at least until the completion of certain ongoing studies, which are expected to require approximately two years.

The Commission's order makes this case moot. The proceedings that were the subject of the court of appeals' decision have been terminated, and the policy statement that gave rise to the proceedings has been withdrawn.⁴ No new proceedings concerning the recycling of plutonium will take place for at least two years, and, if they take place then, they will not present the legal questions that are presented here.

³The Commission's order is reproduced as an appendix to this suggestion of mootness.

⁴The Commission's order allowed consideration to continue concerning recycling of small quantities of mixed-oxide fuel for experimental purposes and concerning fuel storage, the disposal of existing waste, and the decontamination or decommissioning of existing plants. These exceptions to the Commission's general order do not affect this case; the court of appeals did not prohibit the issuance of licenses for experimental purposes (Pet. App. A-71), and questions concerning storage, decontamination, and decommissioning do not depend on any decisions concerning the recycling of plutonium.

The Commission also reserved for decision at another time whether it should issue a license to allow "noncommercial" recycling for "experimental and feasibility purposes" (page 6, *infra*) at the completed plant in Barnwell, South Carolina. This, too, does not affect this case, because the court of appeals did not prohibit the issuance of licenses for experimentation. Only a proposal to consider issuing a commercial license for the Barnwell plant would keep the dispute in this case alive, and the Commission has stated that it will not authorize commercial activities there or anywhere else.

¹"Pet. App." refers to the appendix to Pet. No. 76-653.

²The Commission expressed doubt that any applicant would be able to satisfy its criteria for the issuance of a license prior to completion of the GESMO proceedings. It suggested, however, that summary reversal would be appropriate in order to preserve the option of issuing licenses.

During the next two years the Executive Branch, with the Commission's participation, and the many nations participating in the International Nuclear Fuel Cycle Evaluation will undertake a comprehensive investigation of plutonium recycling and other nuclear fuel options. This investigation, and studies being conducted by the Commission and other parts of the government, should produce much of the information that the court of appeals thought was essential before licenses could be issued. Any future decisions would be influenced by the accumulation of new information. Consequently, although we cannot say whether any of the pending applications for licenses might be reinstated, or under what conditions licenses might be issued, consideration of applications in two years would not raise the question presented by this case—whether the Commission should have completed additional environmental studies before stating in 1975 that it would consider issuing interim licenses for plutonium reprocessing. Cf. *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289, 327-328.

Because the present controversy is no longer live, and because it is most unlikely to recur, the United States and the Nuclear Regulatory Commission submit that the Court should vacate the judgment of the court of appeals and remand the case to that court with instructions to dismiss the petitions for review. See, e.g., *Weinstein v. Bradford*, 423 U.S. 147; *United States v. Munsingwear, Inc.*, 340 U.S. 36.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General.

JANUARY 1978.

APPENDIX

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Mixed Oxide Fuel

ORDER

Under a November 1975 policy statement (40 Fed. Reg. 53056), the Commission has been conducting proceedings on the Generic Environmental Statement on Mixed Oxide Fuel (GESMO) to determine whether and under what conditions uranium and plutonium might be recycled from spent light water nuclear reactor fuel and fabricated into fresh mixed oxide fuel on a wide scale. Under the same policy statement, the Commission has also been processing applications for the construction, operation, and modification of facilities to reprocess spent fuel, fabricate mixed oxide fuel, and perform related functions. The U.S. Court of Appeals for the Second Circuit held that the Commission could not issue such licenses for commercial-scale activities until it had completed the GESMO proceedings. *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*, 539 F. 2d 824 (1976), cert. granted, 430 U.S. 944 (1977).

On April 7, 1977, President Carter announced a nuclear non-proliferation policy which called for the indefinite deferral of domestic commercial reprocessing and recycling of plutonium and the commencement of domestic and international studies of alternative fuel cycles. The Commission suspended the GESMO proceeding in April and in May announced its intention to reassess the November 1975 policy statement and sought public comment and the President's views on the appropriate future course for plutonium recycle-related proceedings.

Public comments were received in June and a letter stating the President's views in October. The Commission then sought public comment on the President's views and on several specified alternative courses of action. Comments were received in November.

In light of these events and after consideration of all the comments received, the Commission decided at public meetings in December 1977—

- (1) to terminate the GESMO proceeding;
- (2) to terminate the proceedings on pending or future plutonium recycle-related license applications, except for—
 - (a) proceedings on licenses for the fabrication or use of small quantities of mixed oxide fuel for experimental purposes, and
 - (b) those portions of proceedings which involve only spent fuel storage, disposal of existing waste, or decontamination or decommissioning of existing plants;
- (3) to re-examine the above matters after the completion of the ongoing alternative fuel cycle studies, now expected to take about two years;
- (4) to publish the draft safeguards supplement to the GESMO document as a staff technical report;
- (5) as a consequence of the above decisions, to withdraw the November 1975 policy statement; and
- (6) to reserve for decision, if it arises, the question of whether a facility such as the Barnwell facility may be licensed for experimental and feasibility purposes on a noncommercial basis to investigate processes which support the nation's non-proliferation objectives.

The proceedings affected by this decision are the Generic Environmental Statement on Mixed Oxide Fuel (Docket No. RM-50-5), Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility, Uranium Hexafluoride Facility, and Plutonium Product Facility) (Docket Nos. 50-332, 70-1327, and 70-1821), Exxon Nuclear Company, Inc. (Nuclear Fuel Recovery and Recycling Center) (Docket No. 50-564), Westinghouse Electric Corporation (Recycle Fuels Plant) (Docket No. 70-1432), and Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant) (Docket No. 50-201). This order shall be filed in these dockets and shall be served on all parties of record.

Commissioner Gilinsky notes that he considers the inclusion of item (6) above unnecessary and inappropriate in this order.

Commissioner Kennedy notes that he would prefer the use of the term "defer" to "terminate" in items (1) and (2) above.

The Commission will shortly publish a statement of the reasons underlying this decision. This statement will include the separate views of Commissioner Kennedy on the above-mentioned matter.

It is so ORDERED.

For the Commission.

/s/ Samuel J. Chilk

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.
this 23rd day of December, 1977.